

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER NO. 11 OF 2003

1. S.R.Maheshwari,
2. Mohanbhai Parmar,
3. Govindji N. Desai,
4. Rameshbhai Nanavati,
5. Pramod Patel,
6. Mrs. Chetna Desai,
7. Mrs. A.R.Maheshwari,
8. Bipinbhai Dani. ... Appellants.

V/s.

1. Dinyar E. Tangari,
2. M/s.S.A.Developers,
3. K.V.Bhatia,
4. Mrs.C.K.Bhatia. ... Respondents.

M.P.Vashi for the appellants.

M.S.Sanghavi, senior counsel with Smt.M.P.Shroff
i/b. M/s.Gagrat & Co. for respondent No.1.

CORAM : V.C.DAGA, J.

RESERVED ON : 6th August 2004.

PRONOUNCED ON : 31st August 2004.

JUDGMENT :

. This appeal is directed against the order dated 17th February, 1999 passed by the City Civil Court at Bombay in S.C.Suit No.7321 of 1995 directing return of plaint under section 9A read with order VII rule 10 of Code of Civil Procedure, 1908 ("C.P.C." for short).

The Facts :

2. The facts giving rise to the present appeal, in nutshell, are that the appellants/ original plaintiffs ("plaintiffs" for short) are the purchasers and occupants of various flats constructed by respondent No.2/ defendant No.2 - the builders and developers ("defendant No.2" for short) on the property owned by the deceased mother of defendant No.1/ respondent No.1 herein; in terms of agreements executed by defendant No.2 in favour of plaintiffs. The terms and conditions of all the agreements are identical.

3. The mother of defendant No.1 under agreement dated 29th July, 1988 (Exh.A to the plaint) granted right in favour of defendant No.2 to develop the suit property on terms and conditions set out therein. The defendant No.2 in

the process of development of plot constructed one building having number of residential apartments and put the plaintiffs in possession of their respective flats. However, no conveyance has so far been executed by defendant No.2 in favour of the plaintiffs, the respective flat owners. They have filed separate suit to obtain conveyance in their favour. The said suit is pending for trial and decision.

4. The terms of the agreement entered into between the plaintiffs and defendant No.2 specifically make reference to the terms of agreement between the mother of defendant No.1 and defendant No.2 in the following words:

" AND WHEREAS by the said Agreement for sale the Builders have agreed with owner that she the owner will not be required to become a member of the co-operative society or other body corporate to whom the said land with the main building may be ultimately transferred and conveyed and she the owner will not be required to contribute towards or pay any maintenance charges but that she would maintain in repairs the separate house to be constructed for her as hereinabove recited and she would bear and pay all taxes and other outgoings in respect of such separate house AND WHEREAS the Builders had submitted to the Municipal Corporation of Greater Bombay (hereinafter referred to as "the corporation") the plans for the main building as well as for the separate house for the owner and the corporation has approved the said

plans....."

5. The plaintiffs while obtaining agreements in their favour specifically declared that they had inspected the terms and conditions of the agreement of sale between the mother of defendant No.1 and defendant No.2. The

declaration in this behalf reads as under:

" AND WHEREAS the purchaser/s has/have inspected the said Agreement for Sale as also the Certificate No.APA/3442/CERT.88-89 dated 6/9/1988 issued by the Competent Authority as well as the approved and sanctioned plans mentioned hereinabove AND WHEREAS the Purchaser/s has/have perused the letter dated 12th October 1988 from C.R. Patel and Co., Solicitor and Advocates addressed to the Builders as regards the title to the said immoveable property AND WHEREAS purchaser/s has/have after having acquainted himself herself/ themselves with and having considered all the facts agreed to acquire from the Builders Flat No.21 on the second floor of the main building under construction by the Builders on the said land for the consideration and upon the terms an conditions herein after mentioned and contained....."

6. One of the terms of the agreement between the plaintiffs and defendant No.2 makes a specific reservation in favour of defendant No.1

in the following words:

"6. THE PURCHASER/S doth/do hereby

submit and acknowledge that the Builders
have prior to the execution of this
Agreement informed the Purchaser/s
and/he/she/ they the Purchaser/s hereby
agree -

(a)

(b)

(c) that the Builders, if they so
decide, shall be entitled to allot to
the owner on such terms for such
purpose, with such rights and for such
consideration as the Builders may decide
the open space surrounding the
independent house to be constructed for
her on the said plot AND THAT the
conveyance of the said plot with the
main building in favour of the
co-operative society or other body
corporate shall be subject to owners
rights in respect of open spaces and the
area on which the independent house of
the owner would stand."

7. The plaintiffs contend that under the
agreements between them and defendant No.2, the
recitals and relevant terms of which have been
extracted hereinabove, the bungalow has been
constructed on the rear side of the property, with
a provision for an open space of 12 ft. on the
South and West sides of the bungalow and about 3
ft. on the other two sides thereof. There is
also an open space admeasuring 21 ft. x 60 ft.
meant for parking of cars of the occupants of the
main building newly constructed by defendant No.2.
According to the plaintiffs, the South side of the
newly constructed building is being used as

passage leading to the main building. The plaintiffs claim to have a right over the said portion of the property which is referred to in the schedule annexed to the agreement Ex.A, on the South and North admeasuring 20 ft. and also open space on the rear side of the main building. It is the case of the plaintiffs that defendant No.1 is entitled to have open space around his bungalow to the extent demarcated in red colour boundary line on the plan (Exh.C to the plaint) and that to the rest of the suit property which is outside the red boundary line the defendant No.1 has no right, title and interest.

8. Relying on clause 14(b) of the agreement (Exh.B to the plaint), terms of which are reproduced hereinbelow, the plaintiffs contend that defendant No.2 has a right to allot the said parking space to the plaintiffs or even to the outsiders. Clause 14(b) reads as under:

"14. IT IS HEREBY agreed and declared -

(a)

(b) the Builders shall be entitled to construct covered parking or totally enclosed parking places in the open space surrounding the main building as may be permitted by the corporation and to sell or let such parking places to persons of their choice for such consideration and on such terms and

conditions as the Builders may decide and the purchaser/s shall not be entitled to raise any objection whatsoever to such construction sale and letting and the use of such construction sale and letting and the use of such parking places by the acquirees thereof. However, the Builders shall give preference to the purchasers of the flats in the main building for buying or taking on rent such parking places."

9. The plaintiffs claim right to park their vehicles on the aforesaid open space meant for construction of garages and also as playground for the children. They further contend that defendant No.1 has no concern of whatsoever with the said open space.

10. The plaintiffs alleged that the cause of action for filing suit is the act of defendant No.1, who proceeded to erect fencing in the middle of the open space, which was being used for parking cars by the plaintiffs. The plaintiffs felt that the said fencing would create obstruction to their right to use and occupy the said open parking space and also prevent their children from using it as play ground. They, therefore, chose to set up their right to claim preferential right over the said open space by instituting suit in the City Civil Court at Bombay being S.C.Suit No.7321 of 1995 and moved notice of

motion for rejection of plaint under order VII rule 10 of C.P.C. The plaintiff suffered adverse order which has given rise to the present appeal.

11. In the said suit, as stated, plaintiffs also claimed interim relief which was rejected by the trial Court vide its order dated 11th January, 1996, against which appeal preferred by the plaintiffs, being Appeal from Order No.223 of 1996, has been admitted by this Court and is pending for adjudication. The order of status-quo is operating therein. This appeal is also taken up for hearing along with this appeal.

12. During pendency of the above appeal against refusal of interim relief, suit matured for hearing. Issues were framed by the trial Court. One of the issues framed related to the jurisdiction of trial Court. The trial Court after hearing the parties to the suit reached to the conclusion that open space of about 900 sq.ft. having been excluded from the purview of agreements between the plaintiffs and defendant No.2 it did not form part of amenities to be provided to the plaintiffs under the said agreements. The trial Court was of the view that the said space has not been allotted by defendant

No.2 to the plaintiffs in view of clauses- 5 and 6(c) of the agreements between them, as such defendant No.2 was perfectly entitled to allot to defendant No.1 the open space surrounding the house defendant No.1. The conveyance in favour of the plaintiffs society as and when executed would be subject to the right of defendant No.1 in respect of the said open space. The trial Court, therefore, was of the view that the suit filed would fall within the sweep of section 6(iv)(j) of the Bombay Court Fees Act, 1959 requiring the plaintiffs to value suit claim claiming rights over the immovable property at the prevailing market rate. The trial Court, was also of the view that immovable property is always susceptible to monetary valuation. It was also of the view that 900 sq.ft. open space located in the area of Andheri, Bombay will definitely have valuation more than Rs.50,000/- as such the suit was beyond the pecuniary jurisdiction of the trial Court. With the result, trial Court directed return of the plaint under order VII rule 10 of C.P.C. for presentation before appropriate Court. This order is a subject matter of challenge in this appeal.

The Submissions :

13. Mr.M.P.Vashi, learned counsel for the appellants submits that the open space which the plaintiffs are claiming is the part of their amenities agreed to be provided by the builders and developers, the defendant No.2. If it is an amenity to be provided by defendant No.2, then the suit ought to have been regarded as suit for enforcing rights of the plaintiffs against the builders to comply with requirements of the law, namely, the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale Management and Transfer) Act, 1963 ("MOFA" for short).

14. Mr.Vashi placed reliance on the judgment of learned single Judge of this Court in the case of **Maria Philomina Pereira v. M/s.Rodrigues Construction**, AIR 1991 Bombay 27 to contend that if the flats purchasers want the promoter to comply with the requirements of the law, viz. MOFA, and that if the suit is filed to enforce such obligation arising out of agreements between the flats purchasers and builders and developers, then such suit would fall within the sweep of

section 6(xi). Such a type of suit would not be within the sweep of section 6(iv)(j) of the Bombay Court Fees Act.

15. Mr.Vashi took this Court through various terms and conditions of the agreement to buttress his submission and also relied upon another judgment of learned single Judge of this Court in the case of **Vrindavan (Borivali) Co-operative Housing Society Ltd. v. M/s.Karmarkar Brothers & others.,** 1983 (2) B.C.R. 267. He, thus, prayed that the impugned order be quashed and set aside and the appeal be allowed.

16. Per contra, Mr.Sanghvi, learned counsel for respondent No.1 submits that in view of clause 14(c), the plaintiffs are not entitled to have any claim or right over the open space surrounding the bungalow constructed by defendant No.2 meant for defendant No.1 unless it forms part of amenities described in annexure-C annexed to the agreements. According to Mr.Sanghvi, annexure-C to the agreement, inter alia, shows the open compound area around the building to the extent of 12 ft. except in front of the building i.e. front open space, it being common amenities. Mr.Sanghvi submits that eastern side of the building is the

front side. That side is abutting on the main road, known as Azad Road shown in the plan. In his submission, the plaintiffs can claim relief in in their suit in respect of amenities to be provided to them but not provided by the builder. If the plaintiffs want to claim any other right other than the rights/ amenities provided in the agreement, then such right has to be claimed under the provisions of general law. In his submission, the plaintiffs claim that they have preferential right over the open space existing around the bungalow of defendant No.1, more specifically open space on North side, which has not been given to the plaintiffs by the builders and developers/ the defendant No.2, as such claim of such right would not fall within the scope of the provisions of MOFA. Such right, therefore, has to be separately valued treating it as right to claim interest in the immovable property. He further submits that right to the immovable property is always susceptible to monetary valuation. Since right sought to be claimed is outside the scope of the provisions of MOFA, no fault can be found with the impugned order. Such right has to be valued in terms of money.

17. Mr.Sanghvi further submits that defendant No.2 has not yet executed conveyance in favour of the plaintiffs or the society. In this view of the matter, the plaintiffs do not have any enforceable right. He further submits that even assuming that the plaintiffs have any enforceable right, the said right can be exercised only against the builders and developers i.e. defendant No.2 and not against defendant No.1. If any right is to be claimed against defendant No.1, such suit will have to be valued in terms of section 6 (iv)(j) of the Court Fees Act.

Consideration :

18. Having heard rival parties and having examined the plaint pleadings as also the terms and conditions of the agreements between the plaintiffs and defendant No.2, it would be clear that the plaintiffs were put on notice that the owner (mother of defendant No.1) will not be a member of the co-operative society to be formed by the flat purchasers. They were further put on notice that the owner shall have her own separate house with adjoining open space demarcated in the agreement between the owner and defendant No.2. The plaintiffs, unequivocally, have declared under

the agreement that they have inspected the agreement between defendant No.2 and the original owner, the mother of defendant No.1 without keeping any reservation. Clause 6(c) of the agreement, specifically, stipulates that the flat purchasers/ plaintiffs have agreed and recognised the right of the builders, the defendant No.2 to allot to the owner on such terms for such purpose, with such rights and for such consideration as the builders may decide with respect to the open space surrounding the independent house to be constructed for the owner on the said plot of land and that the conveyance of the said plot of land with the main building in favour of the co-operative society shall be subject to the owner's rights in respect of open space and the area on which the independent house of the owner would stand. This particular term clinches the issue and creates specific right in favour of defendant No.1 or his mother. If that right is to be demolished through suit in question, then it can only be demolished by invading property rights of defendant No.1. The said property rights flowing from immovable property are susceptible to monetary valuation. The open space admeasuring about 900 sq.ft. located in the locality of Andheri at Mumbai, in no circumstances, can be

valued at Rs.50,000/-. The valuation of the said property, if done at market rate, even on conservative basis, would run into lakhs. If that be so, the trial Court was justified in holding that it had no jurisdiction to entertain and try the suit in question and was further justified in directing return of plaint under order VII rule 10 of C.P.C. for being presented in the appropriate forum.

19. The judgments relied upon by Mr.Vashi, learned counsel for the appellants can hardly have any application to the facts of the present case. The submissions advanced by Mr.Vashi, in my considered view, are misplaced.

20. The appellants are granted four weeks time to withdraw plaint in question from the trial Court for presentation to proper Court. In the result, appeal has no merit. It is dismissed with no order as to costs.
